



## **Federal Aviation Administration**

### **Office Of The Chief Counsel**

### **Office Of Dispute Resolution For Acquisition (ODRA)**

## **ODRA ADR SUCCESS STORIES**

The following examples are representative of the success being achieved by the ODRA through the use of alternative dispute resolution.

### **Protest Settlement Achieved By "Cutting the Pie"**

In a protest of a multi-million dollar contract award of a security equipment integration services contract for the FAA Headquarters, an ODRA DRO was appointed to explore ADR options with the parties. The protest, among other things, challenged the Product Team's cost/technical tradeoff. The DRO, acting as an ADR Neutral at the parties' mutual request, conducted a series of discussions with the parties, both jointly and individually. The DRO provided neutral evaluation regarding the likelihood of success of the protest on the merits as well as of the potential remedies that might be ordered in an adjudication. During extended discussions with the protester and intervenor (the awardee), the DRO identified risks that might result in the event of an ordered recompetition or reevaluation, and suggested that they consider settling the protest by means of a negotiated subcontract between the two firms. This suggestion was adopted, and under the negotiated subcontract, the protester was to perform those portions of the work for which its proposal had been rated highest technically. The Government thus realized the dual benefit of having its work performed by the best team technically and paying a reasonable, competitive price. On this basis, the protest was withdrawn.

### **Protest Resolved By Going "Outside the Lines"**

A bid protest was submitted to the ODRA on a technical services contract procurement. The protester (Company A) alleged, among other things, improper evaluation based on the stated evaluation criteria. The ODRA designated both a DRO for adjudication as well as a second DRO, who would serve as an ADR neutral. Adjudication and ADR were to be done concurrently due to the critical nature of the work involved. An ADR agreement was executed by the FAA, Company A and the awardee/intervenor, Company B. Through ADR, the parties agreed upon a tailored discovery plan to include document exchanges and three depositions which were to be limited in duration. After the first deposition, the parties agreed to suspend further discovery pending an attempt at mediation. The ODRA agreed to defer the adjudication as well.

The ADR neutral first suggested that Company A and Company B explore the possibility of a subcontract relationship for the contract at issue as a potential resolution approach. Although the parties determined that approach would not be feasible in the context of the protested procurement, Company B suggested as an alternative that Company A join it as a team member on several large Government task order based contracts (with agencies other than the FAA) on which it -- Company B -- had been selected as a prime contractor. Company A initially resisted that suggestion, primarily because of an inherent lack of trust in its competitor, Company B, and its suspicion that what was being offered by Company B lacked any real substance.

The ADR neutral then requested that the presidents of both firms meet with him separately without their attorneys. This presidents' meeting was conducted with the attorneys' concurrence, in order to establish a better rapport between the two firms (which had never encountered one another previously) and to discuss Company B's suggestion more fully, so that its merit could be appreciated. In advance of that meeting and to "sweeten the pot," the FAA agreed as part of any settlement to reimburse the protester for its bid preparation and protest related costs up to a "not to exceed" sum and to arrange a meeting between the protester's president and a high level FAA procurement official to discuss future contracting opportunities for Company A with the FAA -- a primary concern of Company A. The meeting between the presidents of Company A and Company B was successful, and they were able to achieve an agreement in principle for settling the protest. Thereafter, the neutral drafted and circulated a formal ADR settlement agreement for review by all the parties and their attorneys. Further work by the neutral was needed to obtain concurrence on certain specific terms of that written agreement. Ultimately, with one minor addendum, the agreement was executed by all of the parties. On that basis, the protest was dismissed with prejudice.

The total time consumed from the ODRA's receipt of the protest until its dismissal was only 51 days. The agency averted the expenditure of substantial time and cost that adjudicating the matter would have entailed, and a "win-win" solution was achieved by all, by going "outside the lines."

#### Despite Setback in Negotiations, With Assistance of Second Neutral, Parties Ultimately Achieved Global Settlement Through ADR

A large company and FAA Region both filed multi-million dollar claims against one another in a technically complex contract dispute. The contract in question called for the development and implementation of a large data management system for the FAA. Over the course of contract performance, numerous disputes arose, involving specifications, system performance, software reliability, hardware defects, and warranty.

A mediation was conducted by an outside neutral, an Administrative Board Judge, pursuant to the ODRA's Memorandum of Understanding with the General Services Board of Contract Appeals. During the initial eight months of mediation, the Judge helped the parties devise a plan for investigating the relevant facts and assessing their associated litigation risks. The parties also made several presentations to the Judge, who rendered a neutral evaluation concerning the major claim items. The Judge also facilitated negotiations between the parties. Unfortunately, despite making significant progress, the parties reached an impasse and requested that the matter be adjudicated under the ODRA's Default Adjudicative Process.

The ODRA Director then established an aggressive adjudication schedule, which was to include a two-week hearing. He continued to encourage the parties to reconsider their respective positions, however, and appointed an additional neutral, an ODRA Dispute Resolution Officer ("DRO"), to attempt to "jump start" the stalled settlement negotiations.

The ODRA DRO, in addition to meeting with the parties in person, consulted with the GSBICA Judge regarding the cause for the breakdown in negotiations. Together, the DRO and the Judge developed a strategy for overcoming the parties' "irreconcilable differences." The DRO subsequently suggested a new framework for settlement and facilitated further negotiations that ultimately resulted in a global settlement of all issues in dispute.

### Contract Dispute for Recovery of Wage Rate Escalations

A contractor filed several contract disputes with the ODRA, which totaled in excess of \$300,000.00. The disputes related to employee wages and fringe benefits that the contractor had paid out under the terms of nine separate weather observation contracts covering the preceding five year period. Even though, under these contracts, the contractor had requested the FAA to provide wage rate escalations in accordance with the Department of Labor's applicable wage rate determinations, no action had been taken to modify the contracts, and the contractor did not receive proper reimbursement. A DRO was assigned as the ODRA's ADR Neutral and contacted the contractor and counsel for the Agency for an initial teleconference several days later. The parties agreed that the claim seemed highly amenable to resolution by ADR and resolved to exchange documents and information between themselves.

The DRO convened two teleconferences and with the parties established agreed upon due dates for exchanging certain information and for taking certain actions. The DRO also provided the parties with an impartial evaluation of one disputed legal issue, together with applicable citations to case precedent. In addition, the parties spoke with one another separately to obtain and exchange information. Approximately six weeks after the disputes were filed, the parties reached a final overall settlement agreement as to the amounts due for all contracts involved,

including interest. This was remarkably efficient for the resolution of a complex dispute covering 9 contracts and 5 years' worth of wage rate escalation requests.

### Protest of Furniture Systems Procurement

A protest was filed against a contract award for \$3 million of office systems furniture for a new FAA facility being constructed. The delivery and installation timeframes contemplated by the solicitation were very tight. The contracting officials were under a great deal of pressure because any delay in occupancy of the new building could have resulted in many thousands of dollars in holdover costs for continued occupancy of the current leased facility. The procurement had begun as a buy from the General Services Administration's Federal Supply Schedule (FSS), but was converted mid-stream to an FAA procurement under the AMS. The ODRA designated a DRO as an ADR neutral for purposes of exploring ADR possibilities. After reviewing the initial filings by the parties, the DRO held a teleconference with the regional counsel and FAA contracting personnel to obtain additional background information. The DRO raised with them concerns about the procurement, in terms of its compliance with the AMS, identifying specific areas of apparent non-compliance, and providing those individuals with an "early neutral evaluation" as to the likelihood of how the matter would be handled by an ODRA adjudicator should the matter proceed under the Default Adjudicative Process. The DRO discussed possible agency options for corrective action and how to minimize its impact. As a result of this early intervention, within two weeks after the protest was filed, the Region advised the ODRA and the protester that it would terminate for convenience the one \$10,000 purchase order it had issued under the protested procurement and that it would reprocure its entire requirement for office systems furniture. On that basis, the protest was immediately withdrawn and dismissed.

### Protest of Exclusion from Competition

Company X, whose headquarters were located in State A, wished to bid on a contract to be performed at an FAA Air Traffic Control Center (ARTCC) in the Capital City of State B, an adjacent state. The FAA regional procurement officials, however, decided to limit participation in the procurement to a subset of an existing regional Qualified Vendor's List (QVL) consisting solely of prospective bidders whose headquarters offices were located within the boundaries of State B. The rationale offered for this limitation was that operations at the ARTCC were so critical that the Agency needed the contractor to be able to respond to post-contract completion warranty service calls within a one hour period. On that basis, Company X was excluded from the competition and a contract was awarded to a State B contractor. Company X filed a protest with the ODRA.

The ODRA designated a DRO for purposes of exploring ADR options with the parties. The DRO contacted the FAA regional attorney assigned to the case and provided "early neutral evaluation," suggesting that the region consider

negotiating a settlement of the protest. Within a week, a creative settlement was negotiated with the DRO's assistance and encouragement. In exchange for Company X withdrawing its protest, it obtained a comprehensive resolution of several ongoing claims on another contract it was in the process of completing for the region. Both sides were pleased with the result. The contractor was able to achieve a quick amicable resolution of those claims, and the region paid what it considered a reasonable amount to Company X while avoiding the possibility of having to go through a convenience termination of its existing ARTCC contract and re-competition for that procurement.

### Protest Settlement Involves Assistance With QVL Qualification

A small business contractor protested its exclusion from a Region's Qualified Vendor's List (QVL) for weather observation services providers. An ODRA DRO was appointed to explore ADR options with the parties and, with their mutual consent, served as an ADR Neutral. The DRO conducted an initial joint telephone conference with the parties and then had several additional telephone calls with the parties individually. In the process, he elicited the facts regarding the procurement and demonstrated, to the protester's satisfaction, that, even if he had been included on the QVL for the procurement at issue, he would not have been in line for an award, since his price proposal was higher than that of several other offerors on the QVL. At the same time, the DRO arranged for the Region to provide the protester with valuable assistance in qualifying his firm for inclusion on the QVL for future procurements. On this basis, the protest was withdrawn and dismissed without the need for adjudication.

### Claim for Equitable Adjustment of Construction Contract

Company Y had completed a construction contract for the FAA at a local airport and had submitted four claims for additional compensation for alleged changed work. The claims were denied by the FAA Contracting Officer, and the matter proceeded as a contract dispute before the ODRA. The ODRA designated a DRO, who did an analysis of each of the claims to determine what information would be required before he could form an opinion as to their validity. During an initial teleconference with the parties, the DRO explained the FAA and ODRA policies regarding the use of ADR and suggested that the parties seek to resolve their differences with his help, by means of "early neutral evaluation" and mediation. During the teleconference, the DRO reviewed the claims with the parties in detail, explained the types of information he still needed to form opinions about them, and assigned both sides "action items" to accomplish by the next joint teleconference. Both sides completed their assignments, and, during the second teleconference, the DRO shared with the parties his preliminary views of the four claims. The DRO pointed out a duplication, and the contractor agreed immediately to reduce one of his claims.



Thereafter, the DRO engaged in informal "shuttle diplomacy", consisting of 3 more telephone calls with the contractor and 2 more telephone calls with the FAA regional personnel. The DRO's recommended a settlement position to the FAA regional personnel. Based on their discussion with the DRO, the FAA regional representatives conveyed through him an offer somewhat below that recommended settlement position. The contractor then put forth a counter-offer, which was accepted by the region. Thus, within a three week period, the matter was amicably settled. Each party expended no more than 10 person hours on the effort in total. The region achieved a quick settlement for about one-third of the dollar amount initially claimed. The contractor achieved a quick resolution and close-out of a contract with a minimum of rancor with his customer and was able to do so on his own, without having to incur any legal fees. In traditional contract claim forums (e.g., Boards of Contract Appeals), resolution of claims of this nature can take months, and even longer, and can be quite costly, especially relative to the amounts in dispute.

### Overdue Payment Claim

This contract claim was resolved in 9 days using ADR. The claimant filed with the ODRA a claim for overdue payment on an invoice. Time was of the essence because the claimant's vendors were threatening to put it into bankruptcy. Apparently, there was an internal FAA problem with the paperwork submitted for payment.

The ODRA commenced ADR on the date the claim was docketed and designated a DRO to handle the matter. The DRO conferred with the parties and asked the Agency to verify the accuracy of the assertions made by the claimant. The next day, FAA counsel advised the ODRA DRO that the Agency would expedite payment to the claimant. The claimant received payment shortly thereafter, and promptly withdrew its claim, thanking the ODRA for its assistance. This expeditious resolution preserved the good business relationship between the Agency and this contractor and avoided a more formal process that may well have led to the agency incurring litigation expense, as well as possible obligations for interest and attorney fees.

### Protest of Award to Higher Priced Offer

In a protest against the award of an equipment rental contract based on a higher priced offer, the assigned DRO determined that, while the procurement at issue had a relatively low dollar value, the protester's main concern was that the Agency might make similar award decisions in future procurements. The DRO provided the FAA Product Team with "early neutral evaluation," and, on that basis, the Product Team concluded that the award had, in fact, been flawed. With the DRO's assistance, a settlement was achieved, whereby, in exchange for the withdrawal of the protest, the Product Team promised to rectify the problem in subsequent procurements.

### Protest for Alleged Service Contract Act Violations

The protest involved a fixed-price weather observation service contract. The protester alleged that the awardee was non-compliant with the Service Contract Act ("SCA") and had improperly been determined to be a responsible contractor. The DRO conducted several teleconferences with the parties. The protester acknowledged that its real concern was that the awardee would be granted an increase in price by way of contract modification, in order to comply with all SCA requirements. The DRO facilitated the negotiation of a settlement, which called for the withdrawal of the protest, based on the FAA Region's written commitment that the awardee would be held to all applicable SCA requirements at the awarded contract price.

### Protest of Sole Source Announcement

The protest was against a proposed sole-source acquisition of analog radios. The DRO conducted extensive ADR with the parties, including a two-day principal's meeting in which senior FAA program personnel explained to the protesters executives their rationale for fulfilling the Agency's remaining analog radio requirements from the existing vendor, before switching over to digital technology. As a result of negotiations facilitated by the ODRA DRO, the Product Team reduced significantly the quantities of analog radios being procured, cancelled the proposed sole source acquisition, and purchased the reduced quantities under its expiring contract. On this basis, the protest was withdrawn.

### Multiple Claims for Equitable Adjustment on Construction Contract

A contract dispute was filed, seeking equitable adjustment totaling some \$18,000 for eight claim items. The parties selected an ODRA DRO as their ADR Neutral and executed an ADR agreement. After a series of telephone calls during which the Neutral provided the parties with his evaluation of the strengths and weaknesses of the various claims, the parties had made considerable progress and were close to a settlement. At that point, they mutually agreed to include in their discussions two other claim items, the first, a small item of claimed constructive change for about \$2,500 and the second, a significantly larger comprehensive delay claim for approximately \$50,000. The contractor filed with the ODRA two additional contract disputes for the two claim items, and the ODRA consolidated the three disputes for purposes of ADR as well as any needed adjudication. The parties modified their ADR agreement to include the two new items. After a few additional telephone calls with the Neutral, the parties agreed to a settlement in principal, and the Neutral assisted them in drafting a formal ADR Settlement Agreement. The Agreement provided for a lump sum payment of \$45,000, together with a mutual release of all claims under the contract, other than future warranty claims. As to warranty claims, the Agreement established the warranty commencement date. Upon receipt of the payment, pursuant to the

terms of the Agreement and at the contractor's request, the disputes were dismissed with prejudice.

### Protest Involving Suspected Favoritism

A protest was filed against the award of an FAA Headquarters contract for furnishing telecommunications devices, on an indefinite delivery/indefinite quantity basis. The protest noted that award had been made beyond the 60-day offer period specified in the solicitation, and the protester speculated that the Government had conducted a selective round of discussions with the awardee. The protester asserted that any such selective negotiations were improper, and that the FAA should have held discussions and solicited BAFOs from all offerors.

The Director of ODRA assigned a Dispute Resolution Officer ("DRO") to explore ADR options, and the parties agreed to the DRO serving as their ADR Neutral for purposes of providing early neutral evaluation and facilitative mediation. It became immediately apparent to the DRO from his initial discussions, that the protester had never received a meaningful debriefing. Accordingly, the DRO arranged for an additional debriefing by teleconference, wherein the contracting officer, with counsel, provided an overview of the entire acquisition, and answered a variety of questions posed by the protester. During the course of the debriefing teleconference, it became obvious that, notwithstanding the protester's suspicions, there had been no secretive discussions with the awardee, and that the awardee had not been provided any special opportunity to revise its technical proposal or pricing.

The protester expressed concern that the awardee would not be able to deliver the units at the award price, since certain components had expensive, mandatory sources of supply. The DRO explained to the protester that this was a matter of contract administration, which would not be addressable through the protest, but nonetheless, arranged for the contracting officer to assure the protester that the awardee would be held to all contract terms and conditions. With these assurances, the protester withdrew its protest. The protest was thus resolved to the parties' mutual satisfaction within a very short timeframe.

### Prompt Withdrawal of Untimely Protest

In a protest against an award of a Region's contract for specialized chairs for air traffic controllers, the protester claimed that the Region's evaluation was faulty, in that the awardee's product did not comply with the technical specifications – they lacked specified lumbar support and a required warranty. The ODRA Director assigned a DRO to explore ADR options, and the parties elected to use the DRO as their ADR Neutral. As a result of preliminary contacts by the DRO, the protester conceded that its protest was untimely filed. On that basis, it voluntarily withdrew the protest. The protest was dismissed within 7 days of



having been filed. Notwithstanding the dismissal, the Region, at the ODRA's suggestion, undertook, for its own purposes, to address the concerns raised by the protester and to verify that the chairs it had purchased would comply with the technical requirements of the solicitation.

#### Contract Dispute Concerning Alleged Breach of Good Faith in Contract Administration

On a contract with an FAA Region for weather observation services, a contractor experienced some contract administration-related difficulties. In particular, he claimed that the Region's contract administrator, herself a contract employee, had not been dealing in good faith, had added significant requirements that were not justified by the language of the contract, and had improperly fined the contractor for certain security issues.

The parties undertook to reach a consensual resolution with the assistance of an ODRA ADR Neutral. Facilitated negotiations took place, and the Region and contractor both took steps to resolve their differences. The contractor agreed to obtain the necessary security clearances for all personnel, and a plan was put in place to secure those clearances. The Region, in turn, agreed to rescind the fines earlier imposed and to put a contract administration plan in place that addressed the concerns raised by the contractor.

Following the implementation of the plans, the ODRA held a status conference during which both parties agreed that the outstanding issues had been resolved. The contractor then submitted a formal withdrawal of the contract dispute, whereupon it was dismissed.

#### Protest of Overly Restrictive Solicitation Terms

Company Y filed a pre-award protest of a Solicitation issued by an FAA Region for copier services. The protest alleged that the Solicitation improperly favored the incumbent, Company X, by setting an unreasonably short schedule for submission and evaluation of offers and for commencement of work under the contract. Essentially, the original Solicitation would have required submission and evaluation of the offers within a two-day period at the end of December and commencement of performance by no later than January 1. As a result, only Company X, whose copying equipment was already installed at the Region, would have been able to satisfy the deadline for the commencement of work.

The ODRA Director convened an initial status conference in the matter. The Director had appointed an ODRA DRO to serve as a potential neutral for ADR purposes, and the DRO conferred separately with counsel for the Region and with the protester's representative in advance of the status conference. During the status conference, based on its earlier discussions with the DRO, the Region

agreed voluntarily to take corrective action, changing the date for commencement of contract performance to February 1, and issuing a modification to the Solicitation for that purpose. Company Y then submitted a letter withdrawing its protest, contingent on the issuance of the agreed modification. The DRO verified issuance of the modification two days later, whereupon the ODRA issued an Order dismissing the protest.